Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

FIREFIGHTERS' INSTITUTE FOR RACIAL EQUALITY, *et al.*,

Petitioners,

v.

THE CITY OF ST. LOUIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALTHEA P. JOHNS
LAW OFFICE OF
ALTHEA P. JOHNS, P.C.
Attorney for Petitioners
225 South Meramac Avenue
Suite 325
St. Louis, MO 63105
(314) 725-4145

164239

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

5200

QUESTIONS PRESENTED FOR REVIEW

Whether the Eighth Circuit Court of Appeals' decision to affirm the judgment of the United States District Court for the Eastern District of Missouri granting Respondents summary judgment on all Petitioners' claims, when the Petitioners made a *prima facie* case of discrimination, conflicts with the decision of the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, __ U.S. __, 2000 WL 743663 (2000).

Whether the Eighth Circuit Court of Appeals erred in affirming the United States District Court's granting to Respondents an unreasonable amount of costs as expert fees.

PARTIES TO THE PROCEEDING

Petitioners are:

Firefighters' Institute For Racial Equality, By And Through Its Chairman, Robert Anderson, Charles Bates, Donald Chambers, Michael Coleman, Eric Driver, Kenneth Green, Leroy Harris, Lonnie Hughe, Stanley Johnson, Joseph Jones, John Lester, Roland Logan, James Morgan, Michael Pickett, Zefpro Redding, Gary Ruffin, Lawrence Sayles, Addington Stewart, Nathaniel Sutherland, Lloyd Tate, Gilbert Vaughn, Derrick Webster And David Williams.

Respondents are:

The City of St. Louis, St. Louis Firefighters' Association Local 73, Edwin F. Libby Jr., Dennis Jenkerson, Gerald Jorden Jr., Jay Jennings, William Schurwan, Dwight C. Cross, Mark Bradshaw, Lawrence Reinecke, Robert Milani, Lawrence Auer, Steven Neinhaus, Leo Kuchner, Larry Donovan, Grant A. Berger, Scott Speigel, William O. Hill, Bruce E. Williams, Mark R. Duffy, Theodore Richardson.

STATEMENT PURSUANT TO RULE 29.6

Petitioner, Firefighters' Institute for Racial Equality, a not-for-profit corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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The Eighth Circuit opinion is reported at 220 F.3d (8th Cir. 2000) and is set forth at Appendix A (App. A.) The District Court opinion is unreported and is set forth at App. B.

STATEMENT OF JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on August 11, 2000.

The Eighth Circuit denied Appellants' Petition for *en banc* hearing on September 28, 2000. (App. C.)

The United States Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

FEDERAL REGULATIONS INVOLVED

Equal Employment Opportunity Commission ("EEOC") Guidelines, Uniform Guideline 14c(9):

43 Fed. Reg. 38,303 (1978)

> Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

44 Fed. Reg. 12,005 (1979)

> Any conclusion that a content validated procedure is appropriate for ranking must rest on an inference that higher scores on the procedure are related to better job performance. The more closely and completely the selection procedure approximates the important work behaviors, the easier it is to make such an inference. * * *
>
> Where the content and context of the selection procedure are unlike those of the job, as, for example, in many paper-and pencil job knowledge tests, it is difficult to infer an association between levels of performance on the procedure and on the job. * * * To justify use of such a test for ranking, it would also (in addition to tying tested knowledges to work behaviors) have to be demonstrated from empirical evidence either that mastery of more difficult work behaviors, or that mastery of a greater scope of knowledge corresponds to a greater scope of important work behaviors.

29 C.F.R. § 1607.5 (1975)

> A. Acceptable types of validity studies. For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below.

29 C.F.R. § 1607.7 (1999)

B. Use of criterion-related validity evidence from other sources. Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(2) Job similarity. The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used . . .

29 C.F.R. § 1607.9 (1999)

Sec. 1607.9 No assumption of validity.

A. Unacceptable substitutes for evidence of validity. Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers,

users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

STATEMENT OF THE CASE

Petitioner, F.I.R.E. is a fraternal organization consisting of the African — American firefighters with the City of St. Louis Fire Department, organized to promote the hiring and advancement of African — American firefighters. The individual Petitioners are members of F.I.R.E. and African-American Captains with the City of St. Louis Fire Department who took the promotional examination for battalion chief in 1997. The Petitioners are hereinafter referred to as ("F.I.R.E.").[1]

After F.I.R.E. filed their lawsuit, the District Court granted the St. Louis Firefighters Association, Local 73 ("Local 73") and certain individual members of Local 73 leave to intervene as Respondents with the City of St. Louis.

Between 1980 and 1994, there was no significant litigation over testing in the City of St. Louis Fire Department. All promotional examinations followed the assessment center process the Eighth Circuit Court of Appeals articulated in its 1977 and 1980 decisions in *Firefighters Institute for Racial Equality v. The City of St. Louis*, 549 F.2d 506 (8th Cir. 1977) and *Firefighters Institute for Racial Equality v. The City of St. Louis*, 616 F.2d 350 (8th Cir. 1980), respectively.

1. Only two other African American captains took the promotional examination for ballation chief in 1997, to wit: Vincent Wright, who was a member of Local 73 at the time and Adam Long, who did not belong to F.I.R.E. or Local 73.

In 1992 the City of St. Louis began a testing process for promotion to battalion chief. The testing continued during 1993 and 1994 and consisted of a three-part test battery with differing weights for each part of the test. In 1994, Respondents, Local 73, filed suit against the City challenging the weights assigned to the three-part test and seeking to prevent promotions from the list generated by the test. F.I.R.E. later intervened in the suit. The Court granted a temporary restraining order and a preliminary injunction barring the City from promoting captains based on the list generated by the test. In February 1995, the City abruptly cancelled the promotional testing process, stated that there would be no promotions from the list generated by the test and also stated that the City intended to begin a new testing procedure.[2]

In the spring of 1995, Mr. William Duffe, the Director of Personnel for the City of St. Louis instructed Mr. Roger McCurley, the Personnel Manager for Recruitment and Examination for the City of St. Louis to proceed with another promotional examination for battalion chief in the Fire Department. The City's personnel department sent out Requests for Proposals ("RFPs") to 8 companies on a mailing list. A copy of the RFPs sent out to the 8 firms indicates that the City forewarned the companies that litigation would result from any test without explanation. The personnel department decided not to use firms that had conducted promotional examinations for the Fire Department previously. Mr. Duffe, the Personnel Director then made the decision to include Mr. Tim Person from the Mayor's office and Ms. Jacqueline Davis from the City Counselor's office to form a selection committee with Gary Gebhart and Holly Krampfert from the Personnel Department.

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2. *See generally, St. Louis Firefighters Association, International Association of Firefighters Local 73 v. The City of St. Louis*, 96 F.3d 3223 (8th Cir. 1996).

The selection committee decided there should be 25% minority participation in the project at the insistence of Tim Person from the Mayor's Office. Later, the committee selected two firms as finalists and ultimately awarded the contract to develop, administer and implement the promotional examination to Barrett & Associates, an Akron Ohio based firm. An important factor in the selection of Barrett & Associates was the firm's litigation experience. Barrett & Associates pride themselves on never having lost a court challenge to one of their tests. Barrett & Associates was **not** the lowest bidder for the project. Barrett & Associates did **not** provide for the requisite 25% minority participation. Barrett & Associates did **not** provide for an assessment center component to the test.

The Barrett test consisted of three written multiple-choice sections and an oral exercise. The three written portions of the Barrett & Associates promotional examination, were a job knowledge, an in-basket and a fire scene simulation multiple choice tests. After Barrett & Associates scored all parts of the test and ranked the candidates, only 1 African-American ranked in the top 10 candidates.

Dr. Shirdena Twyman wrote the questions for the job knowledge and in-basket portion of the 1997 battalion chief's test using the mapping process developed by her boss, Dr. Gerald Barrett. According to Drs. Barrett, Twyman and Arthur, a candidate should not have been able to correctly guess the answers to the test questions. Nevertheless, Robert Milani, a white Captain stated that he guessed at his answers and he scored highly on the Barrett test.

Chief Neil Svetanics suggested to Dr. Twyman that first responder question is included on the examination and the first responder questions were included even though those questions do not relate to the job of a battalion chief in the City of St. Louis. Chief Svetanics also suggested to Barrett that two outdated books, from 1987, *Managing People* and *Managing Support Systems* be included on the reading list for the examination, over the preference of Dr. Barrett that other books be used. At least two caucasian Captains, Dwight Cross and Gary Danley had copies of the books, *Managing People* and *Managing Support Systems* before the reading list was announced. The African-American candidates had difficulty obtaining the books *Managing People* and *Managing Support Systems.*

Dr. Nancy Gussett of Barrett & Associates developed the oral briefing exercise. Dr. Twyman, Dr. Roos and Dr. Ortiz rated the candidates and scored the oral briefing exercise using the formula Dr. Twyman developed with Dr. Barrett. All the candidates scored between 10 and 15 on the oral briefing, so it is unclear what the oral briefing exercise tested.

Dr. Winfred Arthur assigned the respective weights give to each portion of the test. Dr. Arthur's report showed that there was a significant difference between the answers from the African — American and the caucasian members of the fire department who interviewed for the weighting process. Dr. Arthur stated that he gave "consideration" to all the answers he received.

Dr. Winfred Arthur also developed the fire scene simulation portion the test. Dr. Arthur has no personal fire-fighting experience. The fire scene simulation was a

pencil and paper fire scene simulation. The 1997 St. Louis battalion chief's examination was the first time that Dr. Arthur developed a fire scene simulation. Dr. Arthur did not pilot test — he simply had a "run through" of the fire scene simulation using doctoral candidates at Texas A& M University.

Similarly, Dr. Barrett did not pilot test the other three portions of the examination. He conducted only a "run through" of the other three portions of the test in Ohio using doctoral students from the University of Akron, who checked for grammatical and other non-subject matter errors. A run through is not the same as a pilot test. According to standard practice, a pilot test uses a sub-set of the test takers in order to validate a test.

Burroughs & Rockhill, a private company, offered a test preparation course to the white fire captains only. The City of St. Louis knew of the private test preparation course shortly after the City announced the test results. Burroughs & Rockhill's promotional literature boasted of great success to candidates who took their preparatory course.

Barrett & Associates, with assistance from city employees, administered the 1997 promotional examination for battalion chief on March 26 and 26, 1997 at the America's Center in St. Louis. After the second and last day of testing, Barrett & Associates took the answer sheets to the City of St. Louis Personnel Department and Holly Krampfert made a copy of the answer sheets, which were left with the Personnel Department in St. Louis. Barrett & Associates also left one of the oral briefing tapes of each candidate with Personnel. No personnel department employee admitted in their depositions that Barrett & Associates had left a copy of the Answer sheets in St. Louis.

The three written portions of the Barrett & Associates promotional examination, *i.e.*, the job knowledge, the in-basket and the fire scene simulation were paper and pencil, multiple choice tests. After Barrett & Associates scored all parts of the test and ranked the candidates, only 1 African-American ranked in the first 10 candidates. The Barrett 1997 promotional test did not test the skills and abilities of the firefighters.

Roger McCurley, Gary Gebhart and Holly Krampfert discussed the results of the Barrett testing with the Personnel Director, William Duffe. Without ever seeing the test, Roger McCurley, Gary Gebhart, Holly Krampfert and William Duffe decided that the test was "fair". In May 1997, Mr. William Duffe, the Personnel Director reported to the new Mayor, Mayor Harmon that the promotional process was fair and the City certified the results of the Barrett test and immediately promoted eight caucasian Captains to the rank of Battalion Chief. The City has since promoted three more white captains to the rank of battalion chief from the list generated by the Barrett testing process.

The history of the St. Louis Fire Department if fraught with racism, and racial divisiveness. Mr. Robert Anderson, Chairman of F.I.R.E. testified about the department's poor history. An independent assessor criticized the racial divisions in the St. Louis Fire Department.

The district court entered Judgment and issued a memorandum and Order for the City and Local 73 on August 12, 1999. The District Court withdrew its August 12, 1999 Memorandum and Order and issued a new Memorandum and Order on September 2, 1999. F.I.R.E. filed a timely Notice of Appeal.

On November 2, 1999 the District Court issued its Order awarding the City and Local 73 their costs. F.I.R.E. filed a Notice of Appeal. The two appeals were consolidated. After oral argument, the Eighth Circuit Court of Appeals affirmed the decision of the District Court. The Court of Appeals denied Petitioners request for an *en banc* hearing.

Petitioners originally brought this cause of action in the United States District Court for the Eastern District of Missouri alleging racial discrimination in the promotional process in violation of 42 U.S.C. § 1981, 1988, 2000e *et seq*., and the Missouri Human Rights Act, 213.010 *et seq.* The United States District Court had subject matter jurisdiction over the Petitioners' federal claims pursuant to 28 U.S.C.§ 1331 since the cause of action arose under the Constitution, laws or treaties of the United States. The United States District Court also had jurisdiction over the Petitioners' supplemental state law claims pursuant to 28 U.S.C. § 1343(a)(3). The Eighth Circuit Court of Appeals had jurisdiction over Petitioners' claims pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision in this case conflicts with the decision of the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, __ U.S. __, 2000 WL 743663 (2000). The Court in *Reeves*, *supra*, articulated the standard for the granting of summary judgment after the Plaintiff has made a *prima facie* case, as occurred here.

Furthermore, the Eighth Circuit's decision conflicts with existing case law in the Eighth Circuit, *Firefighters Institute for Racial Equality v. The City of St. Louis*, 549 F.2d 506

(8th Cir. 1977); *Firefighters Institute for Racial Equality v. The City of St. Louis*, 616 F.2d 350 (8th Cir. 1980), and the Equal Employment Opportunity Commission Uniform Guidelines 14c(9), 43 Fed. Reg. 38,303 (1978) and 44 Fed. Reg. 12,005 (1979).

In *Reeves*, *supra*, the Plaintiff brought a cause of action against his former employer alleging that he was discharged in violation of the Age discrimination in Employment Act. The matter was tried to a jury and the jury found in favor of the Plaintiff. The Defendant employer filed a motion for judgment as a matter of law or in the alternative for a new trial. The District Court denied the Defendant employer's motion. The Fifth Circuit Court of Appeals reversed the District Court and held that the Plaintiff had not introduced sufficient evidence to sustain the jury's finding of unlawful discrimination. The United States Supreme Court granted certiorari to resolve a conflict among the Courts of Appeals on the issues of the kind and amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated on the basis of age and whether the employer was entitled to judgment as a matter of law. The Supreme court held that a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves* at 9.

The Supreme Court went on to opine that because a *prima facie* case and sufficient evidence to reject the employer's explanation may permit a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination. *Reeves* at 10.

In addressing the issue of the standard for granting summary judgment and judgment as a matter of law, the Supreme Court reiterated that the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law, citing *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250-251 (1986). The Court should review all of the evidence on the record. The Court must draw all reasonable inferences in favor of the non-moving party, and it may make credibility determinations or weigh the evidence, citing *Lytle v. Household Mfg Inc.*, 494 U.S. 545, 554-555 (1990). **Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.** *Liberty Lobby Inc.*, 477 U.S. at 255 (emphasis added); *Reeves* at 10-11.

In this case, the District Court granted the Respondents summary judgment on F.I.R.E's claim of discrimination in the testing process. The three judge appellate panel affirmed the District Court's decision. Both the District Court and the panel found that Petitioners made a *prima facie* case of discrimination. The panel then went on to find that the City provided ample evidence that demonstrated multiple choice questions can adequately measure the skills of a battalion chief; that FIRE did not present expert testimony or any other evidence to refute the City's evidence and that therefore the multiple choice format is "job related" to the 1997 battalion chief's exam. The panel did not apply the correct summary judgment standard, made credibility decisions and made inferences from the facts, thereby invading the province of the jury and conflicting with *Reeves*, *supra*.

As stated earlier, there is agreement that FIRE made a *prima facie* case of discrimination in the promotional process. In addition, FIRE presented the following additional relevant evidence, among its other evidence:

- The 1997 battalion chief's test was validated using the ***content*** validation method only.

- Equal Employment Opportunity Commission ("EEOC") Guidelines, Uniform Guideline 14c(9), 43 Fed. Reg. 38,303 (1978) requires that a content validated procedure must rest on the inference that higher scores are related to better job performance, which is not present in this case, i.e. have criterion validity.

- The deposition testimony of the City's designated expert, Dr. Barrett, when asked whether the test at issue was a good predictor of job performance, stated, "if in fact we do a study at some future date it will be shown to be a good predictor." Consequently, the City's own expert, Dr. Barrett had not done any testing to determine whether the test was a good predictor of job performance.

- **There was no empirical validation of the 1997 battalion chief's test and no criterion related study.**

- Dr. Barrett decided that empirical validation in NOT required when content valid tests are developed and used, saying in his final report, "It is also generally conceded that the criterion related validity study *may* not necessarily provide better evidence than the job-relatedness of a test than content validity".

Dr. Barrett cites to his own study as a basis for his statement. The foregoing is a complete violation of 29 C.F.R. §§ 1607.7, 1607.9 (1999).

- NO ONE FROM ST. LOUIS HAD SEEN THE EXAMINATION BEFORE THE EXAMINATION WAS GIVEN AND ALL COPIES OF THE EXAMINATION WERE TAKEN BACK TO OHIO.

- There was no subject matter expert from the City of St. Louis Fire Department who reviewed the test.

- The City's sub-contractor, Dr. Arthur, who developed the fire scene portion of the examination, stated that there were choices available for fire scene testing, but it was up to the client to decide on the alternative.

- The "pilot testing" done by Drs. Barrett and Arthur involved students checking for grammatical correctness, and not persons with fire fighting experience checking for subject matter appropriateness.

- FIRE presented the affidavit of the **current Chief of the City of St. Louis Fire Department, Sherman George**, (who was a Deputy Chief at the time), in support of their proposition that battalion chief do not respond to "first responder" calls.

- Barrett & Associates included a racially negative statement about blacks being less able to delay gratification in page 149 of its preliminary report to the City of St. Louis. When asked about the statement in deposition, Dr. Barrett stated that he was referring to a 1974 study of Hispanic adolescents.

Applying the appropriate summary judgment standards and viewing the above facts and evidence in the light most favorable to Petitioners, there is sufficient evidence for Petitioners' case to survive a summary judgment motion and to be heard by a jury under *Reeves*. The City's own expert testimony is unsound and suspect. Most importantly, the jury will be instructed to disregard expert testimony which is not sound or which is outweighed by other evidence. *See*, Model Jury Instructions for the Eighth Circuit, 4.04. Consequently, Petitioners evidence is sufficient for a trier of the facts to conclude that the 1997 battalion chief's examination was not related to the job of a battalion chief in the City of St. Louis.

The appellate panel made a factual decision and found that the first responder questions are "job related". Here the panel invades the province of the jury since the question is a question of fact. However, Barrett & Associates did not actually say that the firm used the St. Louis Standard Operating Procedures (SOP) in the St. Louis battalion chief's examination in 1997. In reality, Barrett & Associates actually stated that "one standard reference used by fire officers is the Department's Standard Operating Procedures." The St. Louis Fire Department's Standard Operating Procedures (SOPs) are compiled for **the entire fire department and pertain to all the ranks**, not just battalion chiefs. Just because a question can or may be related back to the SOP's does not automatically mean that the question is therefore applicable to the job of a battalion chief. It could be applicable to any other job in the fire department. Furthermore, Dr. Shirdena Twyman, who helped develop the job knowledge portion of the test, stated that the "first responder" questions came from former Fire Chief Neil Svetanics.

Consequently, in light of the conflict with Dr. Twyman's testimony and the general application of the SOPs, viewing the evidence in the light most favorable to the Appellants, the Court should be conclude that there are genuine issues in dispute concerning the "first responder" questions and the 1997 battalion chief's test and the issues are not appropriate for resolution summarily.

The 1997 battalion chief's examination was the first promotional examination since the decision in *Firefighters Institute for Racial Equality v. The City of St. Louis*, 549 F.2d 506 (8th Cir. 1977) in which the City of St. Louis has ***not*** used the assessment center process as a part of a promotional examination. In 1977, the Eighth Circuit Court of Appeals stated that there ***was no good pen and paper test for evaluating supervisory skills***. Nothing has changed with the job duties of a battalion chief since 1977. The experts in the 1977 case, (Drs. O'Leary and Barrett [3]) testified at trial concerning an excellent method of supervisory evaluation known as the Assessment Center technique. The Assessment Center as a selection procedure, uses individual and group exercises that simulate job responsibilities while assessors evaluate a candidate's performance. The Court concluded by urging the parties on remand to devise a test of supervisory skills to be approved by the district court. The one caveat the Court required was that the final test must be validated in accordance with the published EEOC Guidelines. The Court indicated that this could be accomplished by devising a content valid test or by a concurrent criterion-related validity test. The 1977 Court of Appeals evaluated the Assessment Center as a concededly good device, but did

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3. This Dr. Barrett is NOT the same Dr. Barrett as in the instant case.

require that approach to be the sole method finally used. The Court stated that whatever test is used should provide equal reliability and validity. The Court went on the say that because of the difficulty of devising a test properly reflecting the supervisory skills of the applicants, it was possible that a criterion-related concurrent validation test coupled with a limited use of the Assessment Center would meet the guidelines. *Firefighters Institute*, 549 F.2d at 513. The Defendant City's own experts and test developers stated continually, the 1997 promotional examination for battalion chief was validated ***only*** by the content validation method. Accordingly, the test is not in compliance with existing law and the EEOC guidelines.

With regard to the EEOC guidelines, the Court stated that accepted professional methods of "validating" exams for their job-relatedness are found in the EEOC Guidelines published in 29 C.F.R. § 1607.5 (1975). The Supreme Court has said of these test validation techniques: The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "(t)he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." (Citation omitted). *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

The EEOC guidelines have been cited with approval by the Supreme Court, followed by all courts dealing with these issues, and recognized as controlling in at least one circuit. *Firefighters Institute for Racial Equality*, 594 F.2d at 510-511. The EEOC guidelines have not been adhered to in the 1997 promotional examination for battalion chief in the City of St. Louis.

The panel also affirmed the District Court's awarding the Defendant City $64,143.81 in costs, as reasonable. The City's Bill of costs included $57,551.25 bill from Dr. Gerald Barrett. This $57,000.+ dollars is roughly equal to the sum the City paid to Dr. Barrett for the development and implementation of the 1997 battalion chief's test. This is outrageous. Barrett & Associates testified that the adverse impact analysis was done before the results were even forwarded to St. Louis. The final report was also complete before the start of litigation. Barrett & Associates used the same report formats for all the litigation in which the company has participated. All Barrett & Associates had to do was to make Drs. Barrett and Polomsky available for deposition in Ohio. The lynchpin of the awarding of costs is their "reasonableness". Barrett & Associates' costs are patently unreasonable. The panel's decision conflicts with the decision of the Tenth Circuit in *Gray v. Phillips Petroleum Co.*, 971 F.2d 591 (10th Cir. 1992).

The panel's decision on the reasonableness of the City's costs will have a chilling effect on civil rights litigation. Plaintiffs will be afraid to bring meritorious lawsuits because of the fear of being hit with excessive costs should the opposing party prevail. The panel's decision will therefore render all the civil rights statutes "toothless" because no civil rights plaintiff, no matter how good a case he/she has, will venture into court to bring a case. The integrity of the process is at issue because the awarding of unreasonably excessive costs directly impacts on due process — the opportunity to be heard and places an impermissible additional burden on a plaintiff.

The practical effect of the Respondent City's use of the multiple choice examination for promotions the fire department is the virtual exclusion of African Americans from the upper echelons of the fire department.

CONCLUSION

In sum, the City of St. Louis abruptly departed from the testing methods in use for twenty years for promotional examination in the City of St. Louis Fire Department. The new all multiple choice format chosen did not test the skills and abilities of a battalion chief. Petitioners were not given the opportunity to present their evidence of discriminatory testing practices at a trial, even though Petitioners met their burden of making a *prima facie* case.

Accordingly, for all the reasons stated above, Appellants respectfully request that the Court grant certiorari and hear their appeal.

Respectfully submitted,

ALTHEA P. JOHNS
LAW OFFICE OF
ALTHEA P. JOHNS, P.C.
Attorney for Petitioners
225 South Meramac Avenue
Suite 325
St. Louis, MO 63105
(314) 725-4145

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED AUGUST 11, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

99-3676

Firefighters' Institute for Racial Equality, by and through its Chairman; Robert Anderson; Charles Bates; Donald Chambers; Michael Coleman; Eric Driver; Kenneth Green; Leroy Harris; Lonnie R. Hughes; Stanley Johnson; Joseph Jones; John Lester; Ronald Logan; James Morgan; Michael Pickett; Zefpro Redding; Gary Ruffin; Lawrence Sayles; Addington Stewart; Nathanial Sutherland; Lloyd Tate; Gilbert Vaughn; Derrick Webster; David Williams,

Plaintiffs/Appellants,

v.

City of St. Louis,

Defendant/Appellee,

St. Louis Firefighters Association Local 73; Edwin F. Libby, Jr.; Dennis Jenkerson; Jay Jennings; William Schurwan; Dwight C. Cross; Mark Bradshaw; Lawrence Reinecke; Robert Milani; Lawrence Auer; Steven Neinhaus; Leo Kuchner; Larry Donovan; Grant A. Berger; Scott Speigel; William O. Hill; Bruce E. Williams; Mark R. Duffy; Theodore Richardson,

Intervenor-Defendants/Appellees,

Appendix A

Gerald Jr. Jorden,

Intervenor-Defendant/Appellee.

No. 99-4245

Firefighters' Institute for Racial Equality, by and through its Chairman; Robert Anderson; Charles Bates; Donald Chambers; Michael Coleman; Eric Driver; Kenneth Green; Leroy Harris; Lonnie R. Hughes; Stanley Johnson; Joseph Jones; John Lester; Ronald Logan; James Morgan; Michael Pickett; Zefpro Redding; Gary Ruffin; Lawrence Sayles; Addington Stewart; Nathanial Sutherland; Lloyd Tate; Gilbert Vaughn; Derrick Webster; David Williams,

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City of St. Louis,

Defendant/Appellee,

St. Louis Firefighters Association Local 73; Edwin F. Libby, Jr.; Dennis Jenkerson; Jay Jennings; William Schurwan; Dwight C. Cross; Mark Bradshaw; Lawrence Reinecke; Robert Milani; Lawrence Auer; Steven Neinhaus; Leo Kuchner; Larry Donovan; Grant A. Berger; Scott Speigel; William O. Hill; Bruce E. Williams; Mark R. Duffy; Theodore Richardson,

Intervenor-Defendants/Appellees.

Appendix A

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: June 14, 2000

Filed: August 11, 2000.

Before WOLLMAN, Chief Judge, BEAM, Circuit Judge, and PANNER,[1] District Judge.

BEAM, Circuit Judge.

Firefighters' Institute for Racial Equality[2] and twenty-two individual plaintiffs (collectively FIRE) brought suit against the City of St. Louis (the City) and the St. Louis Firefighters Association Local 73 (Local 73)[3] for violations of 42 U.S.C. §§ 1981, 1988, and 2000e-2 (Title VII), and the Missouri Human Rights Act. The district court[4] granted summary judgment to the City and Local 73. FIRE appeals and we affirm.

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1. The Honorable Owen M. Panner, United States District Judge for the District of Oregon, sitting by designation.

2. FIRE is an organization with a primarily African-American membership.

3. Local 73 represents all firefighters in negotiations with the City, but has a membership that is primarily Caucasian.

4. The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

Appendix A

I. BACKGROUND

Barrett & Associates (Barrett), at the City's behest, developed, administered, and scored a promotional exam for the rank of battalion fire chief, and provided a ranking of candidates based on the results of the exam. The four- part exam tested job knowledge and supervisory/managerial skills, had a fire scene simulation and an oral briefing exercise. In 1997, seventy-eight fire captains took the exam, of whom fifty-three were Caucasian and twenty-five were African-American. Twelve captains were placed on the eligibility list, of whom ten were Caucasian and two were African-American. FIRE brought suit, asserting that the disparate impact the test had on the African-American candidates — with 18.8% of the Caucasian candidates being eligible for promotion versus only 8% of the African-American candidates — violates Title VII, sections 1981 and 1988, and the Missouri Human Rights Act.

Over the course of discovery in this case, the district court granted a motion to strike FIRE's expert witness, quashed subpoenas to two non-party witnesses, and refused to compel the testimony of two non-party witnesses and the production of the personnel files of the battalion chiefs promoted from the 1997 exam. After discovery closed, the City and Local 73 moved for summary judgment on all claims. The district court granted the motion, and also awarded costs to both the City and Local 73.

Appendix A

II. DISCUSSION

A. Discovery

Our review of a trial court's discovery decisions is very narrow. *See Derby v. Godfather's Pizza, Inc.*, 45 F.3d 1212, 1215 (8th Cir. 1995). "Reversal is inappropriate absent a 'gross abuse of discretion resulting in fundamental unfairness in the trial of the case.' " *McGowan v. General Dynamics Corp.*, 794 F.2d 361, 363 (8th Cir. 1986) (quoting *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977)).

1. Motion to Strike FIRE's Expert

FIRE contends the district court erred when it granted a motion to strike FIRE's expert for failing to meet the deadline for filing expert reports. There is no question, however, that the expert's report was untimely. The district court set a deadline of December 28, 1998, for disclosure of FIRE's expert and the expert report. FIRE named an expert on that date, but did not provide a report. FIRE assured the court that the report would be completed the first week of January, but failed to fulfill that promise as well. When the district court held a hearing on the motion to strike on February 19, 1999, the report still had not been filed.

Federal Rule of Civil Procedure 16 permits the district court to set deadlines for the disclosure of evidence and to impose sanctions on a party for failing to meet a deadline. *See Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir. 1998). Unless the failure to meet a deadline was either harmless or substantially justified, the court may sanction a party by excluding its evidence. *See id.* at 1008-09.

FIRE asserts it was substantially justified in not filing the report because the City's initial disclosures were insufficient. However, FIRE did not raise this issue until four months after the disclosures were due and two months after the expert report deadline. Additionally, FIRE provided no explanation for its delay in raising this issue. Thus, even if we accepted this after-the-fact justification, it came far too late for us to say the district court abused its discretion by striking FIRE's expert.

2. Quashing the Subpoenas Duces Tecum

FIRE next asserts the district court erred in quashing subpoenas to two non-parties. On April 19, 1999, the last day of discovery, FIRE served a subpoena duces tecum upon Burroughs and Rockhill[5] for its entire file on the St. Louis battalion chiefs exam. The district court quashed the subpoena because it found the method of service did not comport with Rule 45(b)(1). We agree. Rule 45(b)(1) requires FIRE to serve the City with prior notice of commanded production of documents. It failed to serve the City with such notice. Therefore, we find the district court's decision to quash the subpoena was proper.

On April 19, 1999, FIRE also served a subpoena upon Barrett for its exam project file. The subpoena was sent by facsimile (fax) and also by regular mail on the last day of discovery. The district court granted Barrett's motion to quash because FIRE's service failed to comport with Rule 45.

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5. Burroughs and Rockhill offered a commercial exam preparation course to the members of Local 73.

Appendix A

Rule 45(b)(1) requires that service be made by "delivering a copy" of the subpoena to the person. FIRE contends that its service by fax and regular mail meets the requirements of Rule 45(b)(1). We disagree. When a non-party is served, the method of service needs to be one that will ensure the subpoena is placed in the actual possession or control of the person to be served. *See Doe v. Hersemann*, 155 F.R.D. 630, 630 (N.D. Ind. 1994) (allowing service by certified mail). Although this interpretation of Rule 45(b)(1) may allow service by other than personal delivery, it is not broad enough to include either fax or regular mail because the court cannot be assured that delivery has occurred. Therefore, the district court properly quashed the subpoena.

3. Motion to Compel

FIRE contends the district court improperly denied its motion to compel: (1) non-party witness Douglas Cribbs to attend a deposition; (2) non-party witness Steven Kotraba to answer questions certified at his deposition; and (3) the City to produce the entire personnel files of the eleven individuals who were promoted to battalion chief as a result of the 1997 exam. The district court denied the motion to compel as untimely. The case management order set a deadline of eleven days after the close of discovery for all motions to compel. Discovery closed on April 19, 1999. FIRE filed its motion on May 3, 1999 — three days after the deadline. FIRE provided no reason to justify missing the deadline. Therefore, the district court did not abuse its discretion in denying the motion.

B. Summary Judgment

We review a decision to grant summary judgment de novo looking at the evidence in the light most favorable to the non-moving party. *See Jolly v. Knudsen*, 205 F.3d 1094, 1096 (8th Cir. 2000). The district court may grant a summary judgment motion when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

"Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)). If a plaintiff establishes a prima facie case of disparate impact from a testing procedure, then the employer has the burden to justify the procedure by demonstrating that it is related to safe and efficient job performance and is consistent with business necessity. *See* 42 U.S.C. § 2000e-2(k); *see also Allen v. Entergy Corp.*, 181 F.3d 902, 904 (8th Cir. 1999). Even if the employer can meet this burden, the plaintiff can still prevail if he can show that there is an alternative selection method that has substantial validity and a less disparate impact. *See id.*

The district court found FIRE had established a prima facie case of disparate impact resulting from the battalion chiefs exam. Thus, for purposes of this appeal, we will assume the district court's finding was correct. Our assumption shifts the burden to the City to show that the

exam was job-related. FIRE contends the City's exam is not job-related on three specific grounds: (1) three of the four sections were multiple choice; (2) the test included twenty-five "first responder" questions; and (3) two of the books on the reading list were difficult or impossible to obtain and were out-of-date. Each of these contentions will be addressed in turn.

First, FIRE asserts that the use of multiple choice questions violates precedent set by this court in *Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980). In that case, we found the multiple choice portion of the fire captains exam was not job-related because FIRE presented extensive expert testimony that showed skill at a fire captain's job could not be adequately measured by that type of test. *See id.* at 357-59. And, the City did not adequately rebut that evidence. *See id.* FIRE's argument, in this case, rests solely on the this court's 1980 decision regarding the fire captains exam. In this case, however, the City provided us with ample evidence that demonstrates multiple choice questions can adequately measure the skills of a battalion chief. FIRE did not present expert testimony or any other evidence to refute the City's evidence. Therefore, we find the multiple choice format is job-related for the 1997 battalion chiefs exam.

Second, FIRE asserts the "first responder"[6] questions are not "job related." To support this assertion, FIRE presented the affidavits of selected firefighters stating that

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6. A "first responder" is the first person to arrive on the scene who provides emergency care and treatment to ill and injured people.

battalion chiefs do not have "first responder" duties. Barrett, however, reviewed department operating procedures during the test development stage. The Standard Operating Procedures became a part of the reading list that candidates were given and from which all the test questions were drawn. Through its system of linking test questions and all the answer choices to material on the reading list, Barrett demonstrated how each of the test items was tied to a fire department Standard Operating Procedure or specific department responses to different types of incidents. Thus, the "first responder" questions are job-related.

Third, FIRE contends the use of the books *Managing People* and *Managing Support Systems* as resources for the exam violated professional standards because the books were hard to find and the information contained in them was out-of-date. However, Dr. Twymon, of Barrett, and Holly Krampfert, from the City's personnel office, both contacted the publisher of the books before placing the books on the reading list to ensure enough copies were available. Both were assured there was an adequate amount of books. Additionally, it is undisputed that supervisory skills are very important in the battalion chief position. These two books are published by the International Society of Fire Service Instructors, and contain information specific to supervision in the firefighting profession. FIRE does not point to any question on the test or information in the book that was outdated at the time of the exam. Therefore, we find the City demonstrated that these two books are job-related.

FIRE's final argument against the validity of the test is that a commercial test preparation course was offered to the

members of Local 73. However, this course was offered by a private test company who had no inside knowledge of the test contents. The City did not sponsor the course nor did it know of its existence until after the test had been administered. Thus, the course does not undermine the validity of the battalion chiefs exam.

Accordingly, we find the 1997 battalion chiefs exam was related to safe and efficient job performance and consistent with business necessity. In addition, FIRE failed to present any evidence of a less discriminatory procedure. Therefore, the district court properly granted summary judgment to the City and Local 73 on the Title VII disparate impact claim.

Additionally, after carefully reviewing the record and applicable case law, we agree with the district court that FIRE simply presented no evidence of intentional discrimination necessary to support a claim under 42 U.S.C. §§ 1981 and 1988, and the Missouri Human Rights Act, Missouri Revised Statutes § 213.055(3)(2). Thus, the district court properly granted summary judgment on those claims. *See* 8th Cir. R. 47B.

C. Costs

FIRE's final contention is that the district court erred in awarding costs to the City in the amount of $64,143.81 and to Local 73 in the amount of $3,570.97. We review the district court's decision to award costs for an abuse of discretion. *See Greaser v. Missouri Dep't of Corrections*, 145 F.3d 979, 985 (8th Cir. 1998). Under Rule 54(d), costs, other than attorney's fees, are allowed as a matter of course to a

"prevailing party." Fed. R. Civ. P. 54(d)(1). FIRE contends neither the City nor Local 73 is a "prevailing party" in this case because FIRE established a prima facie case and because the City was seeking to overturn precedent. A "prevailing party," however, is one "in whose favor a judgment is rendered, regardless of the amount of damages awarded." *Black's Law Dictionary* 1145 (7th ed. 1999). In this case, judgment was rendered in favor of the City and Local 73, and thus, they are prevailing parties allowed costs under Rule 54(d).

Additionally, FIRE asserts that a majority of the City's expert witness costs are prohibited under 28 U.S.C. § 1920. However, Federal Rule of Civil Procedure 26(b)(4)(c)(i) provides that "the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision." After carefully reviewing the parties' cost submissions, we find all the costs charged were allowed either by statute or by the Federal Rules of Civil Procedure. Therefore, the district court did not abuse its discretion in awarding fees to the City or Local 73.

III. CONCLUSION

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION DATED AND FILED SEPTEMBER 2, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:98CV789 SNL

FIREFIGHTER'S INSTITUTE FOR RACIAL EQUALITY, et al.,

Plaintiffs,

vs.

THE CITY OF ST. LOUIS, MISSOURI,

Defendant,

and

ST. LOUIS FIREFIGHTERS ASSOCIATION LOCAL 73, ET. AL.,

Intervenor defendants.

MEMORANDUM

This matter is before the Court on defendant's motion for summary judgment. The Firefighters Institute for Racial Equality, a fraternal organization, and twenty-two individual

plaintiffs filed this action against the City of St. Louis under 42 U.S.C. §§ 1981 and 1988, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, and the Missouri Human Rights Act, Mo. Rev. Stat. § 230.010, *et seq*. Plaintiffs claim that the test for the promotion of fire captains to battalion chiefs in the City's fire department was illegal because it had a disparate impact on African-Americans. The individual plaintiffs are African-American fire captains who applied for but were denied promotion to battalion chief.

Plaintiffs seek to enjoin the City from using the promotional list generated by the disputed testing procedure, as well as damages. Intervening as defendants are the St. Louis Firefighters Association Local 73 and nineteen white members of the union who are on the current promotion list. Intervenors have joined in defendant's motion for summary judgment.

The relevant factual background of this case begins in 1991 when, as recounted in *St. Louis Firefighters Ass'n v. City*, 96 F.3d 323 (8th Cir. 1996), the City announced plans to implement a testing procedure to promote fire captains to battalion chiefs. The City devised a three-part test and a method to weigh each component. Upon considering the results and contemplating possible litigation on the basis of an adverse impact upon African-Americans, the City reweighed the test results. Following the reweighing, white candidates tended to drop in ranking, and African-American candidates tended to improve in ranking. Local 73 and FIRE each filed complaints against the City seeking to bar the City from making promotions based on the test procedures. Prior to trial, the City canceled the entire promotion test procedure

and announced its intention to establish a new testing procedure, and the District Court dismissed the action as moot. *Id.*[1]

The record in this case establishes the following: In April 1995 the City made a request for proposals seeking an outside consulting firm to develop, administer and score a new test for use in placing candidates in rank order on an eligibility list for promotion of captains to battalion chiefs. In September 1996, the City chose Barrett & Associates (Barrett) of Akron, Ohio. Barrett conducted a job analysis using a "content validation" procedure for demonstrating that test terms adequately represent actual job demands. Pursuant to this procedure, Barrett interviewed 11 battalion chiefs and 4 captains. At the time, there were 12 battalion chiefs, of whom 7 were white and 5 were African-American, and 4 deputy chiefs, of whom 3 were African-American and 1 was white. The one battalion chief who chose not to participate in the interview was white. Based on its job analysis, Barrett established the test components and their weights is follows:

Job Knowledge — written test (100 multiple choice questions): 30%

Fire Scene Simulation: 30%

In-Basket Exercise: 20%

Oral Briefing Exercise: 20%

Service Record: pass/fail

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1. *See Firefighters Institute for Racial Equality v. City of St. Louis*, 616 F.2d 350 (8th Cir. 1980), for a history of earlier promotional practices of the St. Louis Fire Department.

Appendix B

Barrett developed a reading list for candidates to use to prepare for the test, and conducted a formal pre-test training program on-site on March 17 and 18, 1997, at which a comprehensive training manual was provided to the candidates. Local 73 arranged for an outside firm to conduct a three-day workshop, on March 18-20, 1997, to help its members prepare for the test. The City did not participate in this course in any way.

The two-day examination was administered on March 26 and 27, 1997. Seventy-eight (78) fire captains took the exam, of whom 53 were white and 25 were African-American. Of the 53 white candidates, 10 (18.8%) were placed on the eligibility list; of the 25 African-American candidates, 2 (8%) were placed on the eligibility list. As of April 1999, the 10 whites and 1 African-American were promoted to battalion chief. The 12th ranked person on the eligibility list who is now next in line for promotion, is African-American.

The City argues that it is entitled to summary judgment on the Title VII claim because the evidence establishes that the promotional examination was job-related, and plaintiffs have not offered any alternative selection procedure which would result in less of an adverse impact on African-Americans. For summary judgment on the § 1981, § 1988 and MHRA claims, the City argues that the record is devoid of any evidence that the City intended to discriminate against African-Americans in utilizing the promotional examination in question.

In opposition to the motion for summary judgment on the Title VII and MHRA claims, plaintiffs argue that in light

of the adverse impact the test had on African-Americans, it was incumbent upon the City to show that the test was valid. They assert that the City presented no empirical evidence that the test used was a predictor of job performance as a battalion chief.

As evidence that the test was not a good predictor, plaintiffs point to the alleged fact that one of the white fire chiefs who was promoted was shortly thereafter involved in a "racial incident," and another was involved with an "altercation with a citizen." (Br. at 12).

Plaintiffs assert that the multiple-choice format of the written test was objectionable because a battalion chief's primary responsibility does not involve using paper and pencil. They also assert that the content of approximately 25 questions on the written test were not job related because they involved "first responder" situations which a battalion chief does not handle. (Br. at 13-14).

Plaintiffs' next argument revolves around two books which were on the recommended reading list prepared by Barrett, and from which 33 questions on the written test were derived. Plaintiffs assert that the following facts show that the written test was not job-related:

> The African-American candidates who attempted to purchase the two books had difficulty obtaining them;
>
> "Most of the white candidates did not even purchase the books;"

> The books, published in 1987 and 1988, were outdated;
>
> The books were placed on the list at the suggestion of the Fire Chief, and not Barrett;
>
> Two of the fire captains were seen with the books before the reading list was announced.

(Br. at 14-16).

Plaintiffs' next argument is based on the test-preparation workshop arranged for by Local 73. Plaintiffs assert that this course was only offered to the white members of Local 73, and that the only African-American captain who was a member of Local 73 was not sent a copy of a flyer announcing the workshop. (Br. at 16-17). Lastly, plaintiffs argue that they have stated a prima facie case of racial discrimination under § 1981 and § 1988.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c). In considering a motion for summary judgment, the court must view the evidence, and all reasonable inferences to be drawn therefrom, in the light most favorable to the nonmoving party. In response to a well-supported motion for summary judgment, the non-moving party may not rest on mere allegations in the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. General averments or conclusory allegations of an affidavit do not create specific fact disputes for summary judgment purposes. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

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On a motion of summary judgment, the Court will consider only disputes "over facts that might affect the outcome of the suit under the governing law." *Id.* at 248. Nonmaterial facts will not be considered. Where the nonmoving party "has failed to make a sufficient showing of an essential element of his case with respect to which he has the burden of proof, summary judgment is appropriate," *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the evidence is "merely probative" or "not significantly probative," the Court may decide the legal issues and grant summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.

"Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets the 'burden of showing that any given requirement has a manifest relationship to the employment in question.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) *quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *see also, Allen, et. al. Entergy Corp., et. al.*, __ F.3d __[2], 1999 WL 437256 (filed June 22, 1999; rehearing and rehearing en banc denied August 10, 1999) (*citing* both *Albemarle, supra.* and *Griggs, supra.*). The current standard of proof in a discriminatory impact case was first enunciated in *Griggs, supra.*, then reinstated by the Civil Rights Act

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2. According to Westlaw, this case will be reported at 181 F.3d 902 (8th Cir. 1999). Although it is not the usual practice of this Court to cite to cases not yet published, the Court decided to cite to this particular case because it is a recent discriminatory impact case (race) which analyzes a Title VII challenge to the use of employment tests.

and codified in 42 U.S.C. §2000e-2(k).[3] Once a plaintiff has made a *prima facie* case of disparate impact from a selection procedure, the burden shifts to the defendant employer to show that the employment practice in question is "job-related for the position in question and consistent with business necessity . . .". 42 U.S.C. §2000e-2(k); *Allen v. Entergy Corp., supra.* Once the employer meets this burden, the plaintiff can still prevail if s/he can show that an alternative selection method exists that has a less disparate impact and would also serve the employer's legitimate business interest. *Allen v. Entergy Corp., supra., citing Hawkins v. Anheuser-Busch, Inc.*, 697 F.2d 810, 816 (8th Cir. 1983); *see also, Albemarle Paper Co.*, 422 U.S. at 425.

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3. The standard for the burden of proof in disparate impact cases has undergone significant revisions since it was first established in *Griggs*. Under *Griggs*, after the plaintiff establishes a *prima facie* case of disparate impact, the burden is on the employer to prove that the challenged procedure is related to safe and efficient job performance, and that an alternative less discriminatory practice or policy is not available. In 1989, the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 692 (1989), altered the burden of proof and held that after the plaintiff establishes a *prima facie* case of disparate impact, the defendant employer bore the burden of producing evidence of a legitimate business justification in defense of the challenged practice or policy. However, the burden of persuasion remained with the plaintiff. *See, Bradley v. Pizzaco of Nebraska*, 7 F.3d 795, 797 (8th Cir. 1993) (pointing out the significant differences of *Griggs* and *Wards Cove*). In response to *Wards Cove*, Congress enacted the Civil Rights Act of 1991. One of its stated purposes was to codify the standard of proof enunciated in *Griggs*. The 1991 Act and its codification at 42 U.S.C. §2000e-2(k) make clear that the burden of production and the burden of persuasion regarding business justification rest with the defendant employer. *Bradley*, at 797; *Allen v. Entergy Corp., supra.*

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In order to establish a *prima facie* case in a Title VII disparate impact case challenging the use of employment tests, a plaintiff must show that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. *Albemarle Paper Co.*, 422 U.S. at 425 *citing McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also, Ramirez, et. al. v. City of Omaha, et. al.*, 678 F.2d 751, 753 (8th Cir. 1982) (affirming district court's application of *Albemarle prima facie* case standard to find that the plaintiffs failed to make a *prima facie* case of disparate impact in a Title VII challenge to employment tests). It is not uncommon for plaintiffs to use statistical evidence to establish a *prima facie* case of disparate impact. *See, Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 681 (8th Cir. 1996) (citing *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 944 (1988)); *Webb v. Derwinski*, 868 F.Supp. 1184, 1190 (E.D.Mo. 1994) *aff'd* 68 F.2d 479 (8th Cir. 1995) (unpublished decision); *Leidig v. Honeywell, Inc.*, 850 F.Supp. 796, 801 (D.Minn. 1994). The EEOC has adopted what is known as the "4/5 Rule" for establishing a *prima facie* case of disparate impact. "A selection rate for any race, sex, on [sic] ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." 29 C.F.R. §1607.4(D). After reviewing the evidence submitted, the Court concludes that the statistics presented here establish a *prima facie* case of disparate impact discrimination in that the ratio of selection rates is less than

four-fifths, even when measuring those placed on the eligibility list (.71/.08) rather than those actually promoted.

Since the plaintiffs have established the *prima facie* case of disparate impact, the burden shifts to the City to prove that its tests were "job-related". The affidavits and deposition testimony submitted by the City describe the process used in choosing Barrett, and outline Barrett's methods used in developing, administering and scoring the promotional examination. The affidavits and depositions are supported by lengthy reports detailing all of the steps, including a review of the literature, conducting a comprehensive job analysis, and composing a detailed job description. The reports also explain how the questions for the written test, and other examination components, were developed so that the content of the questions would be tied to critical and frequent work tasks of a battalion chief. Test security was measured during the entire testing process.

The reports show that every effort was made to conform to test-development principles generally accepted in the industrial organizational psychology profession, and that the test complies with the EEOC's Uniform Guidelines on Employment Selection Procedures, 29 C.F.R. § 1607.5. "The EEOC has issued 'Guidelines' for employers seeking to determine, through professional validation studies, whether their employment tests are job related." *Albemarle Paper Co.*, 422 U.S. at 430-31. Although these guidelines have not been promulgated pursuant to formal congressional procedures, *see*, *Albemarle Paper Co.*, 422 U.S. at 431, they nevertheless are "entitled to great deference" as "[t]he administrative interpretation of the Act by the enforcing

agency," *Griggs v. Duke Power Co.*, 401 U.S. at 433-34; *see also, Allen v. Entergy Corp., supra.* (*quoting* both *Albemarle* and *Griggs*); *Firefighters Institute for Racial Equality, et. al. v. City of St. Louis*, 549 F.2d 506, 510 (8th Cir. 1977) (application of the EEOC's Guidelines in resolving issue of job-relatedness). The record includes a question-by-question chart showing how each question was linked to a work task and the knowledge required to perform that task.

Plaintiff has produced nothing to refute this abundance of evidence showing the job-relatedness of the examination. The plaintiff did not offer any expert testimony, or other evidence to rebut the City's evidence that the tests were valid and job-related. They offered no evidence that the tests were not consistent with the EEOC's Guidelines, which require selection tests to be job-related. The evidence they did submit was largely irrelevant to the issue of job-relatedness, and/or nothing more than conclusionary assertions that the test was not related to the job of battalion chief.

Furthermore, once the City met its burden of demonstrating that the selection tests were valid and job-related, the plaintiffs had to show that a less discriminatory selection procedure was available in order to avoid summary judgment. This they have failed to do. The plaintiffs have not produced any evidence that there was a better testing method available; i.e., a testing procedure that would have achieved the City's goals while resulting in less of an adverse impact. *See, Allen v. Entergy Corp., supra* (plaintiffs conclusory argument that a seniority system was a less discriminatory selection procedure not sufficient to survive summary judgment).

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The Court concludes that the evidence, viewed in the light most favorable to the plaintiffs, fails to present a genuine issue of material fact regarding the validity and job-relatedness of the employment tests and process used by the City for the promotion of fire captains to battalion chiefs in the City's fire department. Accordingly, defendant City is entitled to judgment, as a matter of law on the plaintiffs' Title VII disparate impact claim.

The Court agrees with the City that there is simply no evidence of any intentional discrimination on the part of the City necessary to support a claim of discrimination under § 1981 and § 1988, *see*, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982), and the MHRA, Mo. Rev. Stat. § 213.055(3)2.

Consequently, the City and intervenor defendants will be granted summary judgment as to the merits of the plaintiffs' complaint.

Dated this 2nd day of September, 1999.

s/ Stephen N. Limbaugh
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC DATED SEPTEMBER 28, 2000

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-3676/4245EMSL

Firefighters' Institute for Racial Equality, et al.,

Appellants,

vs.

City of St. Louis, et al.,

Appellees.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian would grant the petition. The petition for rehearing by the panel is also denied. (5128-010199)

September 28, 2000

Order Entered at the Direction of the Court:

s/ [illegible]
Clerk, U.S. Court of Appeals, Eighth Circuit